The hirer has to return the goods and is obliged to pay the agreed 'hire-purchase price' less the aggregate of the sums previously paid, the net proceeds of the sale of the goods and if unsold the value of the goods and a discount for accelerated payment.

Five. The last point taken on behalf of all the defendants is whether the plaintiff had mitigated the damages and if not the effect of s 75 of the Contracts Act 1950.

In view of cll 14-15 the question of the need to mitigate as suggested by counsel for the defendants does not arise.

The argument is that the plaintiff should have repossessed the goods. The plaintiff say that they had tried to repossess but found the goods were hidden away. Neither the first nor the second defendants have come forward to deny this nor have they stated what has happened to the goods. The eighth defendant does deny that he had conspired with the first and second defendants to have the goods hidden away. However, the whereabouts of the goods is not disclosed.

It seems to me that in the face of cl 14, the hirers not having delivered the goods and being silent about the whereabouts of the goods, the stance taken by the defendants that they have a complaint that the plaintiff has not mitigated the damages is cocking a snook at the plaintiff and perhaps even at the court.

Section 75 of the Contracts Act deals with penalty clauses in a contract. The contention made on behalf of the defendants is that in the plaintiff's claim no consideration is given for the value of the machinery. Clause 15 of the contract was referred to. This provides for the taking into account of the net proceeds of the sale of the goods if repossessed and sold or if not sold their value as determined by a dealer. Both limbs of the provision obtain only if the goods are repossessed. In the instant case the goods as has been seen could not be repossessed. Accordingly it seems to me that cll 4 and 8 have to be looked at. These clauses provide for the hirer to be responsible for the goods and to indemnify the owner for the loss or destruction of the goods. Accordingly in my judgment the computation of the claim on the basis that the machine, the subject of the hire-purchase agreement, being lost does not contravene s 75 of the Contracts Act (or any other provision of the Act) as submitted by counsel for the defendants or at all.

Counsel on behalf of the guarantors, the seventh and eighth defendants, as a last point suggested that in any event those two defendants could not be responsible for the value of the goods which were not repossessed in that they are only guarantors. There is no merit in this argument. The seventh and eighth defendants gave a guarantee and indemnity for all loss.

The appeal was dismissed with costs.

Order accordingly.

Solicitors: *Tajul Ariffin & Co; Joseph Tan & Tang.*

Reported by *Ng Sheau Jiuan*

Ban Guan Hin Realty Sdn Bhd v Sunny Yap Chiok Sai & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C224 OF 1985
VC GEORGE J
26 JANUARY 1987

Civil Procedure – Writ issued against government of Malaysia for wrongful forfeiture of car on ground of non-payment of excise duty – Whether action against government time-barred – Allegation of fraudulent usage of money paid to customs authorities – Not act done in pursuance of any written law – Public Authorities Protection Act 1948, s 2(a) – Limitation Act 1953, s 3

The plaintiff purchased a car from the second defendant and issued a cheque for the excise duty payable on the car to the first defendant, a motorcar salesman employed by the second defendant. The vehicle was handed over to the plaintiff together with its registration book. The plaintiff had possession and uninterrupted usage of the vehicle for just over three years when officers of the Customs and Excise Department seized the vehicle alleging that excise duty on it had not been paid. The Sessions Court later ordered forfeiture of the car on the ground that excise duty on the vehicle had not been duly paid. The plaintiff issued a writ against the first and second defendants and against the government of Malaysia as the fourth defendant. The cause of action relied on as against the government was the negligence of its servants in handling the documentation of the vehicle vis-à-vis the payment of excise duty and the issue of the registration card. The plaintiff also alleged that officers in the customs department fraudulently used funds for its own use when the same was for the express purpose of excise duty. The government applied to have the action against it struck out, contending that the acts complained of were acts carried out by servants of the government pursuant to powers/duties under both the Excise Act 1976 and the Road Traffic Ordinance 1958 and that accordingly by s 2(a) of the Public Authorities Protection Act 1948, the action as against the government was time-barred.

Held, dismissing the application:

(1) In respect of the matters covered by the Public Authorities Protection Act 1948, the provisions of the Limitation Act 1953 have no application. There is nothing express or implied in the 1948 Act that would make for the application of any of the provisions of the 1953 Act.

(2) Section 3 of the Limitation Act 1953 expressly excludes the application of the Act in respect of actions for which a period of limitation has been prescribed by any other written law and the Public Authorities Protection Act 1948 is such a

written law. Section 2(a) of the Public Authorities Protection Act 1948 does prescribe a period of limitation in respect of the suit, action or proceeding referred to therein.

(3) The allegation of fraudulent usage of money paid to the customs authorities cannot be said to be an act done in pursuance or execution or intended execution of any written law, of any public duty or authority or in respect of any alleged neglect or default in the execution thereof and accordingly protection of the Public Authorities Protection Act cannot be invoked.

Case referred to

1 *Anns* v *Merton London Borough Council* [1978] AC 728 (folld)

Legislation referred to

Limitation Act 1953 ss 3, 33
Public Authorities Protection Act 1948 s 2(a)

Anthony Fernandez for the plaintiff/respondent.
Mary Lim Thiam Suan (*Miss*) for the fourth defendant/applicant.

Cur Adv Vult

VC George J: The plaintiff had purchased a new motorcar, a Mercedes Benz 300D, on or about 20 June 1979. The deal was transacted through the first defendant who was a motorcar salesman employed by the second defendant who are dealers in motor vehicles. The plaintiff contends that they are agents of the third defendant who had imported the motorcar. There was excise duty in the region of $14,842.38 in respect of the vehicle and the plaintiff had issued a cheque for that amount to the first defendant and another cheque for the agreed purchase price in favour of the second defendant.

In due course in June 1979 the vehicle was handed over to the plaintiff together with its registration book. The registration book, it is contended, is issued by the Registrar and Inspector of Motor Vehicles after that official is satisfied, inter alia, that the excise duty on the vehicle has been duly paid. The plaintiff had possession and uninterrupted usage of the vehicle for just over three years when on 17 September 1982 officers of the Customs and Excise Department seized the vehicle alleging that excise duty on it had in fact not been paid. On his providing certain guarantees the plaintiff was allowed to hold on to the vehicle until 24 June 1983 when the vehicle was taken away from him by government agents after it was forfeited on the order of the President of the Sessions Court, Kuala Lumpur, on 2 November 1984 pursuant to s 59(2) of the Excise Act. The court held that the excise duty on the vehicle had not been duly paid.

The plaintiff caused the writ herein to issue in January 1985 against the salesman, his employers the motorcar dealers, against the importers and against the government of Malaysia as fourth defendant. The cause of action relied on as against the government is the negligence of its servants, particulars whereof include the careless manner in which the documentation in respect of the vehicle vis-à-vis payment of excise duty and the issue of the registration card was handled. There is also an allegation against officers in the customs department of 'fraudulently using funds for their own use when the same was for express purpose of excise duty'. This allegation calls for further and better particulars which were not as yet sought or given.

The government having entered an appearance has sought to have the action as against it struck out. It is alleged that the acts complained of were acts carried out by servants of the government 'pursuant to powers/duties under both the Excise Act 1976 and the Road Traffic Ordinance 1958' and that accordingly by s 2(a) of the Public Authorities Protection Act of 1948 the action as against the government is time-barred.

Section 2(a) is reproduced:

> 2 Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect –
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

In opposing the application Encik Anthony Fernandez of counsel for the plaintiff sought to call to his aid provisions of the Limitation Act of 1953.

In my judgment in respect of the matters covered by the Public Authorities Protection Act 1948 the provisions of the Limitation Act 1953 have no application. The protection provided by the Act is absolute and provides for no qualifications where the suit, action or proceedings is commenced 'for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of such written law, duty or authority'. In the first place there is nothing express or implied in the 1948 Act that would make for the application of any of the provisions of the 1953 Act. Further, in the 1953 Act itself the provisions of s 3 expressly exclude the application of the Act in respect of actions for which a period of limitation has been prescribed by any other written law:

> 3 This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other written law or to any action or arbitration to which the government or the government of any State is a party and for which if it were between subjects a period of limitation would have been prescribed by any other written law.

The 1948 Act is written law and s 2(a) thereof prescribes a period of limitation in respect of the suits, actions or proceedings referred to therein.

Section 33 of the 1953 Act does state that 'the Act shall apply to proceedings by or against the government in like manner as it applies to proceedings between subjects'. But those words in the sections are prefaced by 'save as in this Act otherwise provided and without prejudice to the provisions of s 3 of this Act'. Section 3 does indeed provide otherwise. It takes cases for which a period of limitation is provided by any other written law out of the Limitation Act of 1953.

But that is not the end of the matter. Two contentions by or on behalf of the plaintiff call for further consideration.

The first is the allegation that the money paid to the customs for the purposes of excise duty had been fraudulently utilized for some other purpose.

Such an act cannot be said to be an act done in pursuance or execution or intended execution of any written law, of any public duty or authority or in respect of any alleged neglect or default in the execution thereof and accordingly protection of the Public Authorities Protection Act cannot be invoked.

The second matter is the complaint that the government had deliberately not brought up the question of non-payment of excise duty until the three years had passed. One question that arises from this is the question as to when time began to run as against the government. The principles discussed in *Anns* v *Merton London Borough Council*[1] apply. Whether the protection provided by the 1948 Act is available could only be decided after a clearer picture of the facts are known to the court to enable it to decide when time began to run as against the government.

The application is dismissed with costs without prejudice to the fourth defendant's right to raise or plead the protection of the Public Authorities Protection Act or the Limitation Act when the facts are clearer.

Application dismissed.

Solicitors: *Anthony Fernandez & Partners.*

Reported by *Ng Sheau Jiuan*

Erria Shipping Pte Ltd v Cara Timur Transport Sdn Bhd

HIGH COURT (SIBU) – SUIT NO 258 OF 1985
CHONG SIEW FAI J
12 SEPTEMBER 1988

Revenue Law – Withholding tax – Commission for shipbroking services claimed by non-resident company – Whether commission subject to withholding tax – Whether payer of commission entitled to deduct withholding tax – Income Tax Act 1967, s 109B(1)(b)

The plaintiff was a company incorporated in Singapore carrying on the business of a shipbroker and shipping agent. It applied for summary judgment against the defendant for S$27,362.50 as commissions payable by the defendant in respect of a charterparty relating to a vessel owned by the defendant. The defendant sought to plead in its defence that only S$17,844.17 was owing to the plaintiff as S$9,518.33 was paid to the Inland Revenue Department as withholding tax pursuant to s 109B of the Income Tax Act 1967 ('the Act'). The central issue before the court, therefore, is whether the commission earned by the plaintiff is subject to Malaysian withholding tax under s 109B(1) of the Act such that the defendant, as the payer thereof, is legally obliged or entitled to deduct the tax thereon upon paying the commission to the plaintiff.

Held, allowing the application:

(1) It is obvious that the commission payable is not for technical advice rendered, under the terms of s 109B(1)(b) of the Act. Even if sub-s (1)(b) extends to 'assistance or services' of a non-technical nature, there is no evidence that the amount claimed is 'in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme'. There is nothing to indicate or suggest that the plaintiff had been involved in any technical management or administration or that the commission earned was in respect of any specialized or technical services rendered.

(2) It has also not been indicated that the commission claimed was deemed to be derived from Malaysia under s 15A of the Act because there is no evidence suggesting that at the material times the management and control of the business or businesses or affairs of the defendant were exercised in Malaysia. Nor has evidence been adduced or reliance placed suggesting that condition (iii) of s 15A of the Act is applicable.

(3) The defendant has failed to satisfy the court on a balance of probabilities that there exists any arguable or triable issue or that for some other reason there ought to be a trial respecting the balance of the plaintiff's claim.

Legislation referred to
Income Tax Act 1967 ss 4A, 8(1)(b), (c), 15A, 109B(1)

Chew Peng Hui for the plaintiff.
Belinda Hii for the defendant.

Cur Adv Vult

Chong Siew Fai J: This application of the plaintiff against the defendant contains two parts:

(a) judgment in the sum of S$17,844.17 on admission by the defendant in its defence filed in this action; and